# Supreme Court of the United States

No. [redacted] 98

KNAUTH, NACHOD & KUHNE,

Petitioners,

*versus*

LATHAM & COMPANY, AND OTHERS,

Respondents.

BRIEF ON BEHALF OF LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS, ON APPLICATION FOR WRIT OF CERTIORARI.

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CHAS. PAYNE FENNER,
*For Latham & Company and American Surety Company.*

Hayman Printing Co., "The Legal Printers," 730 Pophras St., N. O., La.

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This case comes here on an application for *certiorari* by Knauth, Nachod & Kuhne to review a decree of the United States Circuit Court of Appeals for the Fifth Circuit, sustaining a motion on behalf of Latham & Company, American Surety Company and William S. Lovell, Trustee in Bankruptcy, to dismiss the cross-bills, or bills of intervention of the appellants filed by them in a suit brought by William S. Lovell, Trustee in Bankruptcy, of Knight, Yancey & Company against Latham & Company.

## BRIEF STATEMENT OF THE PROCEEDINGS.

Knight, Yancey & Company, large dealers in spot cotton in Decatur, Alabama, having become seriously embarrassed, involuntary bankruptcy proceedings were filed against them in the Northern District of Alabama, and William S. Lovell and Clarence E. Frost were appointed temporary receivers. Alleging that Latham & Company, a cotton firm, domiciled and doing business in Havre, France, had, by delivery to them of a large amount of cotton, received an unfair preference from Knight, Yancey & Company, Frost and Lovell filed their bill in the Southern District of Alabama against that firm to recover about forty-two hundred (4,200) bales of cotton, then in process of shipment by Knight, Yancey & Company to Latham & Company, and at that time located on a steamship wharf in the City of Mobile. The receivers' bill was subsequently amended by adding an allegation, on information and belief, that there were other persons than Latham & Company who claimed some right, title and interest in the cotton in question, and praying that all persons, firms or corporations who claimed any right, title or interest in and to said forty-two hundred (4,200) bales of cotton be made party defendants to the bill and be cited by publication to answer the bill.

After obtaining the leave of court to that effect, the petitioners, presumably in pursuance of the invitation so extended, filed an answer and also what they denominated a cross-bill, or bill of intervention. To this bill Latham & Company and the American Surety Company filed demurrers, and William S. Lovell filed a motion to strike from the files. Before hearing was had on these matters, the petitioners filed an amended cross-bill and thereafter the matter

coming on to be heard on a motion of William S. Lovell, trustee, to strike said amended cross-bill from the files, the District Court so ordered. Thereafter an appeal was taken by Knauth, Nachod & Kuhne to the appellate court, and it was here held that the procedure adopted to secure the dismissal of the cross-bill was not the proper procedure, and that the appellees should have proceeded by demurrer or motion to dismiss.

(See opinion on former appeal, 200 *Federal Reporter*, 403).

The cause having been remanded to the District Court for further proceedings, Latham & Company, the American Surety Company, and William S. Lovell, trustee, then filed motions to dismiss the cross-bill and amended cross-bill of the appellants, and upon hearing, the District Court sustained the motions and dismissed the bills. From that decree the present appeal is prosecuted.

## BRIEF STATEMENT OF CASE MADE BY THE AMENDED CROSS-BILL.

It will be unnecessary to consider the original cross-bill filed by petitioners, as all of its allegations are embodied in the expansive amended cross-bill. This amended cross-bill, the Court will find, teems with irrelevant and redundant and utterly vague allegations, and justly merited the criticism of the Court of Appeals of New York, which had occasion, in the case of *Jeffe vs. Weld*, 102 N. E. 1104, to pass upon its counter-part filed by the petitioners in that case, that Court saying that the bill was "prolix to a degree not easy to characterize."

Stripped of its mass of redundant and irrelevant allegations, the essential facts alleged by the amended cross-bill may be stated as follows:

1. The petitioners were bankers doing business in New York, and particularly were so engaged during the period from the 5th to the 18th of April, 1910, and were, as a part of their business, in the habit of buying foreign bills of exchange drawn on persons in Europe against sale and shipments of cotton.

2. That during said period, from the 5th to the 18th day of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York some thirteen drafts, or foreign bills of exchange, to which were attached thirteen export bills of lading purporting to show that thirteen hundred bales of cotton had been shipped by Knight, Yancey & Company for transportation to several European ports. These drafts were drawn to the order of Knight, Yancey & Company, and the cotton mentioned in the bills of lading was to be delivered to the order of Knight, Yancey & Company, and the insurance certificates attached were payable, in case of loss, to Knight, Yancey & Company, and all of these documents were endorsed in blank by Knight, Yancey & Company.

3. That these drafts, bills of lading and insurance certificates were forwarded to an agent of Knight, Yancey & Company in New York for the purpose of selling same to the petitioners or other bankers, as genuine and valid documents, when in fact they were not, and thereby to obtain money of the petitioners or other bankers on the strength thereof.

4. That the petitioners were misled and deceived, and believing that said documents were genuine, purchased same, and delivered to said agent of Knight, Yancey & Company the sum of $98,005.58, and said agent received said money in that capacity, and delivered same, after possibly deducting his commission, to Knight, Yancey & Company.

5. That, as a matter of fact, said bills of lading were forgeries perpetrated by John W. Knight, or some other person. No cotton was ever delivered on said bills of lading, and the drafts drawn against them were not accepted or paid, and were duly protested.

6. That the method in which these drafts and documents were handled by Knight, Yancey & Company was as follows:

The bills of lading were forged by John W. Knight, or some other person acting for the firm, and were delivered by said firm to the First National Bank of Decatur, Alabama, for the purpose of forwarding the same to New York for sale. To these forged bills of lading were attached foreign bills of exchange and insurance documents, and at the time of delivery of these bills of lading and drafts to the First National Bank of Decatur, for the purpose aforesaid, a domestic or currency draft was drawn by Knight, Yancey & Company on their agent or broker in New York, for the approximate sum of the foreign bills of exchange in United States currency, and this domestic draft was deposited with said bank, and by it placed to the credit of said firm. As collateral security to insure the acceptance and payment of the domestic drafts, the bank took other collateral security, ample for its protection against non-acceptance or non-payment of said domestic drafts.

7. That the thirteen foreign bills of exchange purchased by the petitioners were all deposited with the First National Bank of Decatur for transmission as aforesaid to New York between the 5th and 18th days of April, 1910, and were purchased by the petitioners from F. Van Gerpen, acting as agent of Knight, Yancey & Company, and after Van Gerpen had obtained from petitioners the price of said sale, he accepted and paid the domestic drafts for approximately the aggregate face amount of said thirteen foreign bills of exchange, and accounted for the proceeds thereof, and remitted same to Knight, Yancey & Company, and by them same was deposited, together with other monies of their own, with the First National Bank of Decatur, or other bank, except as some part of the proceeds may have remained in the hands of Van Gerpen, and afterwards paid over to receivers or trustee in bankruptcy.

8. That Knight, Yancey & Company, having deposited the money of petitioners, with other monies of their own, in the First National Bank of Decatur, or other depositaries, held their entire bank credit or account receivable thus created for the account and in trust for the petitioners, at least to the amount of petitioners' money thus deposited.

9. That at the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, said bank credit was expended (except so far as the same may have remained on hand at the date of bankruptcy, as set forth in Schedule 17 annexed to the bill) for certain cotton, and in the creation of certain credits with brokers called deposits for the purchase of cotton. Some of the said brokers' credits were redeemed in whole or in part, and the money again deposited with the First National Bank of Decatur and again reunited;

and some of said bank credits, brokers' credits and other credits representing said trust fund were outstanding at the time of adjudication in bankruptcy, and were subsequently collected by the receivers and the trustee. Certain of the cotton paid for out of said trust fund, or the proceeds thereof, came into the hands of the receivers and trustee, and the estate in bankruptcy has thus been enriched by the money of petitioners, and the receivers and trustee hold all such cotton, or the proceeds thereof, and all such credits, or the proceeds thereof, in trust for the benefit of petitioners to the extent of $98,005.58.

10. That petitioners are not able to specify all of the cotton paid for out of their money, or all the money or bank and brokers' credits subject to a trust in their favor, but annex to their bill twenty-one (21) schedules, showing some fifteen or sixteen thousand bales of cotton purchased with their money, and several hundred thousand dollars of monies and credits likewise created and showing also seventy-six hundred and four (7,604) bales of cotton purchased with trust funds in the possession of the trustee, at the time the cross-bill was filed, together with one hundred and two thousand nine hundred and sixty-four and 22/100 dollars ($102,964.22) of cash, the proceeds of other cotton and credits belonging to said trust fund collected by the trustee.

11. That all of said cotton and monies which they allege were partly in the hands of the trustee, and partly in the hands of other persons (some of whom even were not parties to this suit), were chargeable with a trust in their favor.

12. That the forty-two hundred (4,200) bales of cotton received by Latham & Company, and which were the sub-

ject-matter of the suit between Lovell, trustee, and Latham & Company, were received by Latham & Company as an unfair preference from Knight, Yancey & Company, and the transaction was void as to petitioners.

13. The prayer for relief is as follows:

(*a*) That it be decreed that the sum of $98,005.58 belonging to petitioners was received by Knight, Yancey & Company, between the 5th and 18th days of April, 1910, and was held by them as the money of petitioners;

(*b*) That Knight, Yancey & Company, and the trustee in bankruptcy, render an account for said money, and set forth a true account of all cotton or other property purchased, either in whole or in part, with their said money, and render a true account of the disposition made of said cotton; a true account of what part of said cotton, or the proceeds thereof, came into the hands of the trustee;

(*c*) That the transfer of Knight, Yancey & Company to Latham & Company of the cotton in question, or of any other property purchased in whole or in part with the money of petitioners, be decreed invalid and void as to them;

(*d*) That it be decreed that Knight, Yancey & Company, and Lovell, trustee, held all such cotton, monies and credits in trust for their benefit, and that it be impressed with a lien to the amount of $98,005.58, and that the Court enforce the execution of said trust by Latham & Company and the American Surety Company, their surety, and by the receivers and trustee, out of the property in their hands;

(*e*) That they have such other relief as may be proper.

## POINTS MADE BY RESPONDEN

As additional reasons to those given by the
of Appeals for the affirmance of the judgmei
trict Court, and as showing that the affirmance
ment was correct, we submit the following:

I.

The bill on its face shows that the monies used in the purchase of Latham & Company's cotton were not the monies of the petitioners.

II.

In so far as the bill attempts to charge a trust on the cotton of Latham & Company, it does not trace with sufficient certainty petitioner's money into that cotton to justify a Court in Equity in impressing same with a trust in their favor.

III.

The bill on its face shows that no equitable relief against Latham & Company can be granted, for the reason that the facts alleged show that the relief, if any, should be against the trustee in bankruptcy alone, and cannot be granted in this suit.

## ARGUMENT.

In the argument which follows, we shall contend that, from whatever aspect the allegations of the bill are considered, no equity is shown in said bill against Latham & Company and the American Surety Company, and that being true, it should be dismissed as to all of the respondents. We shall first discuss the allegations of the bill from the standpoint that its averments affirmatively show that the peti-

tioner's money was not used in purchasing the cotton which is the subject-matter of this suit; and then from the standpoint that the allegations of the bill show that the plaintiffs are unable to say with that degree of certainty which the law requires, that their money, or any part thereof, went into this specific cotton; and lastly, from the standpoint that, even if the Court can eke out of the allegations sufficient to say that the petitioners' money, or a part thereof, did go into this cotton, yet in such a case it affirmatively appears from the petitioners' allegations that their money is still in the hands of the trustee, and they can have, in that event, no relief against the other appellees.

## FIRST POINT.

**The bill on its face shows that the monies used in the purchase of the cotton belonging to Latham & Company, the subject-matter of this suit, were not the monies of the petitioners.**

For the purpose of the argument on this point, we shall re-state in a brief form the essential **affirmative** allegations made by the petitioners in their amended cross-bill, which we contend show on the face of the bill that it was not the petitioners' monies that were used in the purchase of the cotton involved in this suit. They are as follows:

(1) Between April 5th and 18th, 1910, Knight, Yancey & Company caused to be issued and sent to New York for sale thirteen foreign bills of exchange, to which were attached thirteen fraudulent bills of lading purporting to evidence shipments of thirteen hundred bales of cotton to foreign ports. (Cross-bill, paragraph 9; Trans., page 81.)

(2) The said thirteen foreign bills of exchange and said thirteen forged bills of lading were delivered by Knight, Yancey & Company to the First National Bank of Decatur **for the purpose of having same forwarded by that bank to a broker in New York for sale** to the plaintiff or some other banker. (Cross-bill, paragraph 11; Trans., page 83.)

(3) Said drafts were so forwarded to one Van Gerpen, a broker in New York. (Cross-bill, paragraph 9; Trans., page 81.)

(4) At the same time said foreign bills of exchange and forged bills of lading were delivered for the purpose aforesaid by Knight, Yancey & Company to the First National Bank of Decatur, a domestic or currency draft was drawn by Knight, Yancey & Company on Van Gerpen in New York for the approximate aggregate amount of said foreign drafts. (Cross-bill, paragraph 12; Trans., page 84.)

(5) Said domestic drafts on Van Gerpen were deposited in the First National Bank of Decatur to the account of Knight, Yancey & Company and the proceeds thereof were placed to the credit of Knight, Yancey & Company. (Cross-bill, paragraph 12; Trans., page 84.)

(6) To insure the redemption of said domestic drafts on Van Gerpen in case of non-acceptance or non-payment, the First National Bank of Decatur took collateral other than said foreign bills of exchange and forged bills of lading, ample to protect them in such an event. (Cross-bill, paragraph 12; Trans., page 84.)

(7) Van Gerpen sold said thirteen foreign bills of exchange, with said thirteen forged bills of lading attached, to the petitioners, and after receiving payment therefor from

the petitioners, accepted and paid the domestic draft drawn on him by Knight, Yancey & Company out of the monies so received from the petitioners. (Cross-bill, paragraph 12; Trans., pages 84 and 85.)

(8) The proceeds of said thirteen foreign bills of exchange were accounted for and remitted to Knight, Yancey & Company by Van Gerpen after deducting his commission and payments, and were by them deposited, with other monies of their own, in the First National Bank of Decatur. (Cross-bill, paragraph 12; Trans., page 85.)

(9) That the monies so obtained and so mingled with other monies of Knight, Yancey & Company were used by them in the purchase of all or some of the cotton mentioned in the twenty-one schedules attached to the bill, which cotton was, at the filing of the suit, in the hands of Latham & Company, the trustee in bankruptcy, and the various other persons mentioned in the bill. (Cross-bill, paragraph 14; Trans., page 85.)

All of the foregoing facts are contained in affirmative allegations made in the bill, and on this statement of facts we claim that it is clear that the funds **actually** used by Knight, Yancey & Company in the purchase of the cotton involved in this case (assuming that any part of it was so purchased) were the funds of the First National Bank of Decatur, obtained by Knight, Yancey & Company by the discount or deposit of the domestic drafts on Van Gerpen, and were not the funds of the plaintiff.

In this connection, it should be noted:

(*a*) The proceeds of the domestic or currency drafts drawn by Knight, Yancey & Company on Van Gerpen were

immediately placed to the credit of the account of Knight, Yancey & Company in the First National Bank of Decatur, and were then checked against by Knight, Yancey & Company to buy this cotton;

(*b*) The thirteen foreign bills of exchange, with the thirteen forged bills of lading attached, were not attached to the domestic drafts on Van Gerpen as collateral, or otherwise. On the contrary, the bill alleges that the bank took other collateral from Knight, Yancey & Company to secure the acceptance and payment by Van Gerpen of the domestic drafts drawn on him;

(*c*) The foreign bills of exchange, with the forged bills of lading attached, were deposited with the First National Bank of Decatur merely to be forwarded by it to Van Gerpen. The First National Bank of Decatur did not buy or discount these foreign bills of exchange or give Knight, Yancey & Company any credit therefor, or thereon, or have any interest therein or relation thereto other than as forwarding agent. The drafts discounted by the bank, and upon which Knight, Yancey & Company obtained money to buy cotton, were the domestic or currency drafts drawn on Van Gerpen, the acceptance and payment of which were secured by other collateral deposited with the bank by Knight, Yancey & Company.

(*d*) Had Van Gerpen refused to accept or pay the domestic drafts drawn on him by Knight, Yancey & Company and discounted by the First National Bank of Decatur, the First National Bank of Decatur would have had to look to the credit of Knight, Yancey & Company and the other collateral deposited by them with it as security for said domestic drafts;

(*e*) The fact that Van Gerpen used the proceeds of the sale of the foreign bills of exchange to obtain money whereby to pay the domestic drafts and whereby the First National Bank of Decatur was reimbursed for monies loaned or advanced to Knight, Yancey & Company by discount of such domestic drafts, and with which they purchased cotton, does not make the monies petitioners paid Van Gerpen the purchase money of such cotton. To illustrate: If I borrow from a bank $1,000.00 on my ten (10) days' note, secured by United States bonds, and with this money buy cotton or other property which I deliver in payment of an antecedent debt, and thereafter to pay my note at maturity, I sell a fraudulent bill of lading to another for $1,000.00 and take these proceeds and pay my note at the bank, it cannot be said that such other person's money was the purchase money of the cotton or other property, so as to impress that property with a trust in his favor as against the person who received it.

(*f*) The money paid by petitioners to Van Gerpen, and used by him to pay the domestic drafts for account of the First National Bank of Decatur did not, after such payment, belong to Knight, Yancey & Company, but to the First National Bank of Decatur, and if such money had been lost in transit, the loss would have been the bank's loss.

We think it is plain, therefore, that from the allegations of the bill it affirmatively appears that it was the money of the First National Bank of Decatur and not the money of the petitioners that was used to purchase the cotton involved in this suit.

In the case of *Jeffe vs. Weld*, in the State courts of New York, the petitioners made in that case exactly the same contentions by a bill of intervention (the counterpart in its alle-

gations of their cross-bill in this case) that they are making here, and the Supreme Court of New York sustained the contention which we are now making.

*Jeffe vs. Weld*, 132 N. Y. Supp. 505, affirmed by Appellate Division, 139 N. Y. Supp. 1101, affirmed by the Court of Appeals, 102 N. E. 1104.

The Appellate Division, in affirming the decree of the lower Court dismissing the petitioners' bill of intervention, said:

> "It does not appear from the allegations of the amended complaint that the cotton which so came into the hands of the defendants was purchased with the plaintiff's money. In fact, it was purchased with money which had been on deposit to the credit of Steele, Miller & Company in their Mississippi banks. That money, or a part of it, had been credited by the banks by reason of the currency drafts deposited and which were afterwards paid by Van Gerpen with plaintiff's money. The deposit of the currency drafts was not made for collection, but for the purpose of being immediately credited to the account of Steele, Miller & Company, as in fact it was. * * * The amount thus credited was not the amount paid by the plaintiff, but it was the proceeds of the currency drafts, and for the acceptance and payment of which the banks had taken security from Steele, Miller & Company. The fact that the currency drafts were accepted and paid by Van Gerpen with monies fraudulently obtained from the plaintiffs by reason of other drafts and forged bills of lading, did not, for the reasons above given, enable them to have a trust impressed upon the cotton because the same had not been purchased with their money."

The petitioners in their brief, seeming to think that the question has some bearing here, attempt to avoid the force of this argument by suggesting that "this argument is based on the hypothesis that when the deposit of the currency draft of Knight, Yancey & Company on Van Gerpen was made, it operated as an outright purchase by the bank." In this respect, they entirely misconceive the point which we make.

It is perfectly immaterial in this case whether the bank or Knight, Yancey & Company had **legal title** to these currency drafts after they had been deposited in the bank to account of Knight, Yancey & Company and they had been credited with the proceeds thereof. The question is not one of **title,** but is, whose money was it that Knight, Yancey & Company drew out of the bank on the strength of the deposit of the currency drafts, and used in the purchase of cotton, the bank's or the petitioners'?

It is immaterial to the determination of this question whether the bank purchased the drafts and placed the purchase price to Knight, Yancey & Company's credit, and thereby became the legal owner of the drafts, or whether the bank merely accepted the drafts for collection, leaving Knight, Yancey & Company the legal owners. For the fact still remains that the bank did then and there **loan** or **advance** or **pay** Knight, Yancey & Company a certain sum of money on the strength of either the domestic drafts or the other collateral deposited specially by them to guarantee the payment of the drafts. It makes no difference which, so far as concerns the validity of our argument. And it was that particular money, so obtained by them from the bank as a loan, advance, or payment, whichever one may choose to call it, which the cross-bill alleges Knight, Yancey & Company

used to pay for this cotton. That money was undoubtedly the bank's money. Nor is the situation altered by the fact that Knight, Yancey & Company, by an independent transaction of sale betwen them, represented by Van Gerpen, and the petitioners, thereafter obtained a sum of money which they used either to repay a loan or advance made to them by the bank on a different account, to wit: a currency draft on Van Gerpen or that the bank reimbursed itself for the purchase price paid for the currency draft by receiving payment from Van Gerpen out of the monies obtained by him from petitioners.

Let us suppose this case: Kinght, Yancey & Company deposited a currency draft on Van Gerpen with the bank and deposited certain stocks as security thereto. The bank then placed to their credit the amount of the draft, which they immediately withdrew and used to buy cotton, which they delivered on contract to a third person. At the same time they delivered certain foreign bills of exchange, to which were attached certain bills of lading, to the bank, with instructions to forward same to Van Gerpen. The bank's function with reference to these foreign bills was merely that of forwarding agent. It had no other relation towards these documents, nor any interest in them. Van Gerpen received the foreign bills and sold them to petitioners; received from them the money; but instead of paying the currency draft misappropriated the money, or otherwise misappplied it, and the currency draft was returned unpaid. Whose money is it, which was previously drawn out of the bank and used to buy the cotton that was lost, if Knight, Yancey & Company and their collateral failed to make good? Unquestionably, the bank's.

The cases cited by petitioners have no bearing on the question here presented. The cases of *Richardson vs. Louisville Banking Company*, 94 Fed. 442, and *Beal vs. City*, 50 Fed. 647, and the other cases cited, involve merely the question of **title or ownership as between the bank and the depositor** of a draft deposited in the ordinary course of business without any special understanding or agreement as to whether it was purchased by the bank or taken by it for collection. In all of these cases, the banks had not paid or advanced the depositor anything on account of the draft deposited, and in none of them was the question, whether or not monies paid, advanced, loaned or credited on account of the drafts were the bank's money, in any way involved, and these cases, we submit, are not authority in the instant case.

## SECOND POINT.

**The bill does not trace with legal certainty petitioners' money into the Latham cotton so as to justify a court of equity in impressing same with a trust in their favor.**

In order to subject specific property, and especially specific property in the possession of a third person, to a trust in their favor, petitioners must trace definitely and certainly the trust funds into the specific property sought to be charged. A mere inference or suggestion on their part that their money was so used is not sufficient, and vague and general allegations that their money was used in the purchase of either the cotton claimed by Latham & Company, or that claimed by Westphalen & Company (who were not parties to the suit), or that claimed by the other persons mentioned (who were not parties to the suit), or that found in the hands of the trustee when bankruptcy was declared, and which show that the petitioners cannot, with that certainty required

by the law, point out the specific property purchased with their money, do not state a cause of action.

The authorities to this effect are so numerous and so unanimous that we content ourselves with a citation of some of the most apposite.

*Litchfield vs. Ballou*, 114 U. S. at 195.
*Randolph vs. Allen*, 73 Fed. 39-40.
*Ferris vs. Van Vechten*, 73 N. Y. 113.
*Phillips vs. Overfield*, 13 S. W. 705.
*Ober vs. Cochran*, 45 S. E. 384.
*Parker vs. Jones*, 67 Ala. 234.
*Ardis vs. Smith*, 52 Ga. 102.
*Oliver vs. Platt*, 3 How. 401-402.
*Peters vs. Baine*, 133 U. S. 670.
*Metropolitan Bank vs. Campbell*, 77 Fed. 705.
*Empire vs. Carroll*, 194 Fed. 604.
*Jeffe vs. Weld*, 132 N. Y. Supl. 505; and 39 Cyc. 530, 551.

An examination of the allegations of the bill shows on its face that the petitioners cannot trace their money with the required certainty into the Latham cotton. A reading of the 14th, 15th, 16th and 17th paragraphs of their amended cross-bill (Trans., pages 85-89) will show their utter uncertainty as to whether their monies were used in the purchase of the Latham cotton in Mobile, or the Latham cotton in Pensacola, or the Westphalen cotton in Pensacola, or the Ingelfingen cotton in New Orleans, or the large amount of cotton that came into the trustee's hands from the possession of the bankrupts, or whether it formed a part of the monies deposited by Knight, Yancey & Company with a dozen or more banks and brokers, or formed a

part of the monies that were found in possession of the bankrupts at the time of their bankruptcy. And, finally, having designated every bale of cotton purchased by Knight, Yancey & Company after April 5, 1910, every bank or broker's credit opened by them after that date, and every payment made by them, as having been purchased or made out of their monies, all of which property they described in twenty-one (21) schedules covering twenty-six (26) pages of the printed transcript, they conclude the 20th paragraph of their cross-bill with the statement:

> "The schedules hereto annexed are made part hereof, but they are not exclusive, and your orators, Knauth, Nachod & Kuhne, will ask leave to follow their money into any assets that may have come into the hands of the receivers or trustee. They also submit that any assets in the hands of the trustee should be applied to the reimbursement of their $98,005.58, first of all, whether their money be traced into the same or not."

This is the same bill concerning which the New York Court of Appeals, in the case of *Jeffe vs. Weld*, 102 N. E. 1104, **sustaining the point we now make,** made these observations:

> "There can be no doubt of the rule that funds obtained by fraud may be followed through however many transmutations of form they may have passed, so long as the rights of a third party for value and in good faith do not intervene; but this complaint, though prolix to a degree not easy to characterize, is so replete with hypothetical and alternative allegations that it is not possible on any reasonable interpretation to spell out any direct allegation that the money obtained from these plaintiffs did in fact pass into the cotton upon which it is sought to impress a trust."

## THIRD POINT.

**The cross-bill on its face shows that no equitable relief against these respondents can be granted for the reason that the facts affirmatively alleged show that the relief, if any, should be against the trustee in bankruptcy alone, and cannot be granted in this suit.**

We base our contention on this point upon the well-settled principle that when trust funds have been mingled with the private funds of a trustee and payments have been made out of such mingled funds, the presumption is that the trustee paid out of his own private funds, if sufficient funds are found in his hands to satisfy the trust funds.

*Empire vs. Carroll*, 194 Fed. 604-605.
39 Cyc. 539, and authorities there cited.
3rd Pomeroy, Eq. Jurisprudence, Section 1049, pages 2021-2022.

The rule is thus stated by Pomeroy:

> "When trust money has been mingled with other funds, and the trustee has subsequently withdrawn a portion, it is presumed by the Court that he has withdrawn his own money and left the trust fund; and therefore it is only necessary to show that an amount has remained on deposit that is equal to the amount of the trust fund."

If, therefore, the cross-bill shows by its affirmative allegations, that there are in the hands of Knight, Yancey & Company, or in the hands of their trustee in bankruptcy, of these alleged mingled funds or of cotton, sufficient to satisfy the claims of the petitioners, then the presumption is that the funds or property so remaining in the hands of Knight,

Yancey & Company, or their trustee in bankruptcy, are the funds or property of the petitioners. Especially will this presumption be invoked in behalf of a third person, because it is a well-settled principle that a third person should not be disturbed where the trustee or his representative is able to respond, or where the *cestui qui trust* can obtain relief without disturbing the rights of such third person.

*Crutchfield vs. Haynes*, 14 Ala. 49.
*Litchfield vs. Ballou*, 114 U. S. 195.

An examination of the schedule attached to the petitioners' amended cross-bill shows that there are in the hands of the trustee in bankruptcy both cotton and monies, claimed by them to be a part of the trust fund for their benefit, sufficient many times over to satisfy their claim.

The following cotton is alleged to be in the hands of the trustee and to constitute the cotton or a part thereof, purchased with the appellant's money, to wit:

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| Schedule 7 (Trans., page 109) | 965 Bales |
| Schedule 9 (Trans., pages 113-115) | 1,998 Bales |
| Schedule 10 (Trans., page 116) | 306 Bales |
| Schedule 21 (Trans., page 121) | 4,335 Bales |
| Total | 7,064 Bales |
| Schedule 17 (Monies, etc., Trans.— Pages 119-120) | $23,612.06 |
| Schedule 18 (Monies, etc., Trans.— Page 120) | 79,352.16 |
| Total trust monies now held by trustee | $102,964.22 |

In other words, the trustee has remaining in his hands, out of the alleged trust fund, more than six times the number of bales of cotton claimed by the petitioners to be due them, and an amount of cash in excess of their disbursements.

In these circumstances, we submit that a court of equity will not decree a trust against property in the possession of a third person, when it affirmatively appears that a sufficient amount of the trust funds remains in the hands of the trustee to satisfy his claim.

We respectfully submit that the application for the writ should be denied.

WALKER B. SPENCER,
CHAS. PAYNE FENNER,
*For Latham & Company and*
*American Surety Company.*